WONG AH SUAN v. SARAWAK ELECTRICITY SUPPLY CORPORATION & ANOR.

[P.C. (Lord Diplock, Lord Edmund-Davies, Lord Scarman, Lord Lowry and Lord Brandon of Oakbrook) January 18, 19 and March 3, 1982] [Privy Council Appeal No. 30 of 1980]

Administrative Law – Licence giving exclusive right of supplying electricity in Saratok, Sarawak – Subsequent licence granted to Sarawak Electricity Supply to supply electricity in area – Consent sought from original licensee – Whether consent unreasonably withheld or refused – Whether right to be heard given to licensee – Audi alteram partem rule – Matter considered by Governor in Council – Sarawak Electricity Supply Corporation Ordinance, 1962, ss. 14 & 15.

In this case the appellant had been given a licence giving him the exclusive privilege of supplying electricity to Saratok in Sarawak. Under the Sarawak Electricity Supply Corporation Ordinance, 1962, the Government had a scheme for rural electrification. Under the Ordinance it was provided that the corporation (the first respondent) would not supply electricity to a consumer in an area which forms part of the area of supply of the licensee, except with his consent. It was also provided that where the licensee refuses or withholds such consent the Corporation can appeal to the Governor in Council, who can, if satisfied that such consent has been unreasonably refused or withheld, dispense with such consent. The Corporation asked the appellant for consent to supply electricity to some applicants from Saratok but this was refused. The appellant also turned down a request to charge the new rates for the supply of electricity fixed by the Ministry of Communications and Works. The Corporation thereupon appealed to the Governor-in-Council who after considering the material evidence including the correspondence between the Corporation and the appellant found that the consent of the appellant had been unreasonably withheld and refused. Licence was therefore granted to the Corporation. The appellant thereupon brought an action against the Corporation (first respondent) in which he claimed a declaration that the Corporation was precluded from using, working or operating any installation for the supply of electrical energy within that area of Saratok covered by the licence granted to the appellant, an injunction and damages. He also brought an action against the Government of Sarawak (the second respondent) in which he claimed a declaration that the action of the Governor in Council in dispensing with his consent to a supply of electricity by the Corporation within the area of the licence was *ultra vires* and void, and a declaration that the licence granted to the Corporation to supply electricity within the area of his licence was also *ultra vires* and void.

The actions were consolidated and the learned trial judge gave judgment for the appellant. He ordered (a) a declaration that the action of the Governor in Council purporting to dispense with the consent of the appellant was null and void; (b) a declaration that the licence granted to the Corporation was null and void in so far as it purported to cover the area designated in the appellant's licence. He also granted damages but not the injunctive relief claimed.

The learned trial judge based his judgment on the following findings of fact –

(a) that the Corporation did not inform the appellant that an appeal would be lodged with the Governor in Council under the proviso to section 15(2) of the Ordinance;
(b) that the Government did not inform him that the appeal had been lodged;
(c) that the plaintiff was not informed of the date on which the appeal would be considered;
(d) that he was given no opportunity to deal with the complaints against him or to present and develop the reasons why he refused his consent to a supply by the Corporation;
(e) that the receipt of a letter from the Corporation was the first he knew that there had been an appeal and the Governor-in-Council had dispensed with his consent.

The learned trial judge held that the rule of *audi alteram partem* applied in this case and that there was a breach of natural justice as the plaintiff-appellant had not been given a proper or any opportunity of being heard, that is, of presenting his case orally or in writing to the Governor in Council before a decision on the Corporation's appeal was taken.

The respondents appealed to the Federal Court which allowed the appeal ([1980] 1 M.L.J. 65). Although the Federal Court agreed that the rule of *audi alteram partem* was applicable, they reached the conclusion that notwithstanding the failure to give the plaintiff the opportunity to state his case, the Governor in Council had all the material evidence before him and that he could have come to no other conclusion than that the plaintiff's consent had been unreasonably withheld.

The appellants appealed.

Held: (1) the Federal Court fell into the error of thinking that under subsection (3) of section 15 of the Ordinance consent shall be deemed to be unreasonably refused if the licensee is not willing and able to supply the electricity upon the terms which the Corporation was willing and able to offer. The subsection on the other hand requires the Governor-in-Council to have regard, amongst other things, to the terms upon which the Corporation is willing and able to supply. "To have regard amongst other things" is far different from an obligation to treat the Corporation's terms as conclusive of reasonableness;

(2) the letter of the appellant to the Corporation which was presented to the Governor in Council was no more than an indication of his case, namely that he can and does supply electricity on reasonable terms. It is no substitute for detailed evidence and argument, which would be needed on an appeal to the Governor-in-Council, who has to decide not only on the reasonableness of the licensee's charges but whether in all the circumstances he should exercise his discretion against the licensee;

(3) it was impossible on the facts of the case to know what the Governor-in-Council would have decided had the appellant been given an opportunity to develop orally or in writing his full case before the decision was taken. It could not be said with any certainty that the decision would have been the same and therefore the appeal must be allowed.

Cases referred to:

(1) *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1595.
(2) *N.W.L. Limited* v. *Woods* [1979] 1 W.L.R. 1294.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Lord Bledisloe Q.C. (Miss Marion Simmons with him) for the appellant.

Robert Gatehouse Q.C. (Christopher Clarke and *Matthew Chan* with him) for the 1st respondent.

Nicholas Lyell Q.C. (Michael Gettleson and *Denis Ong* with him) for the 2nd respondent.

Cur. Adv. Vult.

Lord Scarman (delivering the judgment of the Board): Mr. Wong Ah Suan, who is the appellant before their Lordships' Board, instituted two civil suits in 1976. It will be convenient to refer to him as the plaintiff. The first was an action against the Sarawak Electricity Supply Corporation ("SESCO") in which he claimed:–

(1) a declaration that SESCO was precluded from using, working or operating any installation for the supply of electrical energy within that area of Saratok covered by a licence dated January 20 1961 and granted by the Governor to the plaintiff;
(2) an injunction; and
(3) damages.

His second action was against the Government of the State of Sarawak, in which he claimed:

(1) a declaration that the action of the Governor-in-Council in dispensing with his consent to a supply of electricity

by SESCO within the area of his licence was *ultra vires* and void; and

(2) a declaration that a licence granted by the Governor on May 10, 1974 to SESCO to supply electricity within the area of his licence was also *ultra vires* and void.

There was no claim for damages against the Government.

The actions were consolidated. At the hearing of the consolidated action it was agreed that the question of damages in the first suit be deferred until after the main issue in the two cases had been determined.

In consequence, the question was not dealt with at first instance or in the Federal Court. All issues related to that question, both as to liability and quantum, would appear to be open to the parties, if and when damages have to be considered by the court after the conclusion of this appeal.

The action came on for trial before Seah J. The plaintiff was successful: and on December 14, 1978 the learned judge ordered:-

(1) a declaration that the action of the Governor-in-Council purporting to dispense with the consent of the plaintiff was null and void:

(2) a declaration that the licence granted to SESCO on May 10, 1974 was null and void in so far as it purported to cover the area designated in the plaintiff's licence.

The learned judge refused injunctive relief, taking the view that damages would provide an adequate remedy, and ordered that the question of costs should be reserved to a later date.

The defendants appealed to the Federal Court, who allowed their appeal and dismissed the two actions with costs. On March 4, 1980 the court gave the plaintiff leave to appeal to His Majesty the Yang di-Pertuan Agong. In this appeal the plaintiff seeks to have the order of the learned trial judge restored, while the respondents seek to uphold the decision of the Federal Court.

The facts from which the litigation arises are fully set out in the very careful judgment of the learned trial judge and were reviewed with equal care by the Federal Court. Save on one matter which has become the critical issue of the appeal the two courts are agreed both on fact and on law. It is, therefore, unnecessary for their Lordships to do more than give an outline of the essential facts before dealing with the question which in their view is determinative of the appeal.

Since January 1961 the plaintiff has supplied a substantial area of the town of Saratok with electricity. He does so pursuant to a licence dated January 20, 1961, whereby, subject to certain conditions, which do not require consideration in this appeal, he was granted the sole and exclusive right and full power to supply electricity in the area specified. The licence was to continue in force until December 31, 1985 and thereafter for further successive terms of five years each until determined in the manner set out in the licence. The licensee was obliged to maintain installations and apparatus for the supply of electricity in proper order and repair, to ensure a continuously and constantly maintained supply during the hours of darkness; additionally, he was to ensure a continuous supply for 24 hours a day where demand "will afford [him] reasonable profit upon the additional capital and ... running costs thereby incurred": clause (5) of the licence. The licence contained a list of maximum charges and some detailed provisions declaring the voltages to be maintained and the permissible variation. The licence was not assignable: no compensation for goodwill is payable upon termination, but the Government does then have the right to require the licensee to sell them his whole installation at a fair market value to be determined by arbitration, if not agreed. Clearly the licence was a valuable commercial asset capable, if developed successfully, of providing the plaintiff with a profitable return on his investment, which, although he received initially some sort of subsidy, was clearly substantial. He had a true property interest to protect, if the Government should seek to cancel it, or restrict it in any way.

On October 19, 1971 the Governor granted the appellant a supplemental licence raising the maximum permissible charges for electricity supplied. The plaintiff raised his charges to the new maximum on February 1, 1972.

The plaintiff's licence and supplemental licence were granted him under the power conferred upon the Governor by section 4 of the Electricity Ordinance (Sarawak Cap. 137). In 1962 there was introduced the Sarawak Electricity Supply Corporation Ordinance (Sarawak Ordinance 25 of 1962) ("the Ordinance") which came into force on January 1, 1963. It provided for the establishment of SESCO as a public corporation having the duty to secure the supply of electrical energy at reasonable prices: section 14(1)(d). Section 15 of the Ordinance is in these terms:-

"15. – (1) Subject to the provisions of subsection (2), in so far as it is able to do so, the Corporation shall supply energy to any person, other than a licensee, requiring a supply of energy (in this section referred to as a consumer), if such consumer undertakes to enter into a contract with the Corporation, giving such security as the Corporation may require, to take, or continue to receive, and to pay for a supply of energy upon such terms and conditions as the Corporation may determine.

(2) The Corporation shall not supply energy to a consumer, other than the licensee, in any area which for the time being forms part of the area of supply of a licensee, except with the consent of such licensee:

Provided that where the consent of a licensee is required under this subsection and such licensee refuses or withholds such consent, the Corporation may appeal to the Governor-in-Council, and the Governor in Council, if satisfied that the consent of such licensee is unreasonably refused or withheld, may dispense with such consent.

(3) For the purposes of the proviso to subsection (2), consent shall be deemed to be unreasonably refused or withheld if the licensee is not willing and able to supply the requisite energy upon reasonable terms and within a reasonable time, having regard, amongst other things, to the terms upon, and the time within, which the Corporation is willing and able to supply such energy."

The effect of subsection (2) of the section was that SESCO could not, save with the consent of the plaintiff, supply electricity to any consumer in the area of Saratok covered by his licence. His franchise was protected. But from 1970 onwards there was among some consumers a strong sense of grievance at the appellant's charges. On May 2, 1972 the Chief Electrical Inspector wrote a letter to the plaintiff inquiring whether he was willing to surrender his licence, to which the appellant replied that he would do so on payment of $400,000 compensation. The Government was not prepared to accede to the appellant's demand: and there the matter rested for a time.

Local discontent continued to grow, and on July 23, 1973 the Government intervened by addressing to the plaintiff a letter which, in the light of what is now known of its circumstances, can only be described as astonishing. It purported to introduce new tariff rates well below those permitted the plaintiff under his supplemental licence of October, 1971. The letter, it seems, was sent only to one "non-SESCO" supplier, namely the plaintiff himself: and it is now conceded that the Government had no right or power to introduce a tariff in this way. Then on August 1 1973 the general manager of SESCO wrote to the plaintiff this letter:—

August 1, 1973

Mr. Wong Ah Suan,
Swan Electrical Works Sdn. Bhd.,
Abell Road,
Kuching.
Dear Sirs,

Electricity Supply in Saratok
This is to inform you that we have received more than 60 applications for our Corporation to supply electricity to Saratok new bazaar, Kampong Melayu Illir, and Ulu, and the other outskirts of Saratok Bazaar.
Pursuant to section 15 of the Sarawak Electricity Supply Corporation Ordinance No. 25 of 1962, we hereby apply to you, as the present Licensee operating in Saratok, for consent to supply electrical energy to the above-mentioned applicants.
As this is a matter of urgency, we would appreciate a reply within *one week* of the receipt of this letter, failing which we would presume that you do not agree to give us the consent.

Yours faithfully,
(Sgd.) Lye Fah Yew
GENERAL MANAGER."

The letter was a request, pursuant to section 15(2) of the Ordinance, for the plaintiff's consent to a supply by SESCO of electricity to the 60, or more, applicants mentioned in its first paragraph. The plaintiff refused his consent by his solicitors' letter of August 8, which was in these terms:—

August 8, 1973.

General Manager,
Sarawak Electricity Supply Corporation,
P.O. Box No. 149,
Kuching.
Dear Sir,

Electricity Supply in Saratok
We act for Mr. Wong Ah Suan of Swan Electrical Works Sdn. Bhd., Abell Road, Kuching, who has placed in our hands your letter LFY/POF/H12/21 dated August 1, 1973, with instructions to reply thereto.

Our client says that he is, and has been, able and willing to supply the requisite energy upon reasonable terms and within reasonable time and that, therefore, he is not prepared to give the consent you seek.
Our client would like to take this opportunity to request you (as he has requested the Government by separate letter in reply to the letter from the Ministry of Communications and Works dated July 23, 1973, addressed to him with copy to you) not to do anything that may directly or indirectly make it difficult for him to continue the supply of electrical energy in accordance with the Licence and the Supplementary Electricity Licence granted to him by successive Governors in 1961 and 1971, respectively.

The Government is acting unreasonably and illegally in purportedly introducing new electricity tariff rates set out in the said letter dated July 23, 1973, for the supply in Saratok, having regard to the fact that the applicable rates are clearly set out in the said Supplemental Electricity Licence – the rates considered reasonable by His Excellency the Governor in 1971 are still undoubtedly reasonable.

Yours faithfully,
(Sgd.) Thomas & Co."

It will be noted that in this letter the plaintiff's advisers refer to their reply to the Government's letter of July 23: by that reply they had protested strongly, refusing to accept the purported new rates and suggesting the existence of a "combined effort" by Government and SESCO to make it impossible for him to carry on business.

No doubt it was because the plaintiff and his advisers foresaw that refusal might be followed by an application to dispense with his consent under the proviso to the subsection that their letter of August 8, 1973 sets out succinctly and briefly his two conditions:

(1) that he was able and willing to supply electricity on reasonable terms and within a reasonable time – words which echoed the language of subsection (3) of the section: and
(2) that his rates "considered reasonable ... in 1971 are still undoubtedly reasonable".

The plaintiff, however, heard no more from SESCO or the Government. Yet, though he was not informed, much was happening. On August 11 SESCO applied to the Government for a dispensation of consent from the plaintiff; and on December 27, 1973 the Governor-in-Council purported to dispense with his consent. On May 10, 1974 the Governor granted SESCO a licence which authorised SESCO to supply electricity to consumers in a number of areas including that for which the plaintiff was the licensed supplier. SESCO began supply in November 1975. On November 3 the plaintiff, through his lawyers, protested and threatened proceedings. SESCO's reply dated November 19, 1975 was in these terms:—

November 19, 1975

"Messrs. Thomas & Co.,
Advocates,
KUCHING.
Dear Sirs,

re: Electricity Supply in Saratok
We act on behalf of Sarawak Electricity Supply Corporation. We refer to your letter to our clients dated the November 3, 1975.
2. Your client had unreasonably refused or withheld his consent to allow our clients to supply electricity to the area concerned. Pursuant to section 15 of the Sarawak Electricity Supply Corporation Ordinance, 1962, our clients have obtained dispensation of the consent of your client.
3. There is no basis for our clients to cease operation as demanded by your client in paragraph 3 of your said letter.

Yours faithfully,
Sgd. "

The learned trial judge's findings are not in the least surprising: and they are beyond challenge. They were:—

(1) that SESCO did not inform the plaintiff that an appeal would be lodged with the Governor-in-Council under the proviso to section 15(2) of the Ordinance;

(2) that the Government did not inform him that the appeal had been lodged;
(3) that the plaintiff was not informed of the date on which the appeal would be considered;
(4) that he was given no opportunity to deal with the complaints against him or to present and develop the reasons why he refused his consent to a SESCO supply;
(5) that the receipt of the letter of November 19, 1975 was the first he knew that there had been an appeal and that the Governor-in-Council had dispensed with his consent.

Both the learned trial judge and the Federal Court have held that upon the true construction of section 15(2) and (3) of the Ordinance the rule of natural justice known as the *"audi alteram partem"* rule applies. The law is fully set out in the judgment of the learned judge and was accepted by the Federal Court. Their Lordships agree and would wish to add nothing to their treatment of the point.

The learned trial judge went on to find a breach of natural justice, namely that the plaintiff was not given a proper or any opportunity of being heard, *i.e.* of presenting his case orally or in writing to the Governor-in-Council before a decision on SESCO's appeal was taken. The Federal Court does not demur from this finding. Their Lordships have no doubt that it was correct.

The Federal Court, however, decided the case against the plaintiff on a point with which, in their judgment, the learned judge had failed to deal adequately, or even at all. They reached the conclusion that, notwithstanding the failure to give the plaintiff the opportunity to state his case, the Governor-in-Council had all the material evidence before him and that he could have come to no other conclusion than that the plaintiff's consent had been unreasonably withheld.

Counsel for the respondents sought to support this conclusion by two submissions, one of fact and the other of law. Upon the facts, they made two points. First, the plaintiff was well aware (as, indeed, he was) of the discontent of some of his consumers and of their efforts to persuade the Government to allow SESCO into Saratok. Secondly, the plaintiff's whole case is to be found in his lawyers' letter of August 8, 1973, which was placed before the Governor-in-Council. Upon the law, they submitted that the result of the appeal would have been no different even if the plaintiff had been able to state his case to the Governor-in-Council and that accordingly the breach of procedure in not affording him this opportunity cannot give him a remedy in the courts. They relied upon a dictum of Lord Wilberforce in *Malloch* v. *Aberdeen Corporation*[1] at page 1595B:–

"The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

The factual submission fails upon two grounds. First, because it is based on a misapprehension of what is required of the Governor-in-Council by subsection (3) of section 15 of the Ordinance. The misapprehension is that under the subsection consent shall be deemed to be unreasonably refused if the licensee is not willing and able to supply electricity upon the terms which SESCO is willing and able to offer. The Federal Court also fell into this error, the Chief Justice who delivered the judgment of the court saying that in such circumstances the licensee's consent, however reasonable he may think he is to refuse it, is deemed to be unreasonably refused. But the subsection says nothing of the sort: it requires the Governor-in-Council to have "regard, *amongst other things* (emphasis supplied), to the terms upon ... which" SESCO is willing and able to supply. "To have regard, amongst other things" is far different from an obligation to treat SESCO's terms as conclusive of reasonableness. An illustration of the point in another branch of the law may be seen in the construction placed by the House of Lords upon section 17(2) of the English statute, Trade Union and Labour Relations Act 1974: *N.W.L. Limited* v. *Woods*[2]

Secondly, it was urged that the plaintiff's full case was presented to the Governor-in-Council in the letter of August 8, 1973. The letter is, in their Lordships' view, no more than an indication of his case, namely that he can and does supply electricity on reasonable terms. It is no substitute for detailed evidence and argument. Yet this is what would be needed on an appeal to the Governor-in-Council who has to decide not only on the reasonableness of the licensee's charges but whether in all the circumstances he should exercise his discretion against him.

These being their Lordships' conclusions on the factual submission, it is unnecessary to consider the point of law. Their Lordships think it impossible on the facts of this case to know what the Governor-in-Council would have decided, had the plaintiff been given an opportunity to develop orally or in writing his full case before the decision was taken. It cannot be said with any certainty that the decision would have been the same.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be allowed and the order of the trial judge restored. The respondents must pay the costs of the appellant before this Board and in the Federal Court.

Appeal allowed.

Solicitors: *Linklaters & Paines; Coward Chance; Stephenson Harwood.*

ZAIBUN SA BINTI SYED AHMAD v. LOH KOON MOY & ANOR.

[P.C. (Lord Diplock, Lord Elwyn-Jones, Lord Russell of Killowen, Lord Keith of Kinkel and Lord Brandon of Oakbrook) March 9 and April 20, 1982] [Privy Council Appeal No. 27 of 1980]

Contract – Agreement to sell land – Specific performance – Agreement providing for damages – Court's exercise of discretion – Specific Relief Act, 1950, (Act 137), ss. 11 & 19.

This was an appeal from the decision of the Federal Court reported in [1978] 2 M.L.J. 29. The respondents had claimed specific performance of a contract for the sale of land against the appellant. The learned trial judge had found in favour of the respondents